

DEPARTMENT OF HEALTH AND SOCIAL SERVICES
DIVISION OF MEDICAID AND MEDICAL ASSISTANCE
Statutory Authority: 31 Delaware Code, Section 512 (31 Del.C. §512)
16 DE Admin. Code 20400

FINAL

ORDER

Special Needs Trust

NATURE OF THE PROCEEDINGS:

Delaware Health and Social Services ("Department") / Division of Medicaid and Medical Assistance initiated proceedings to amend Delaware Social Services Manual (DSSM) regarding Special Needs Trust, specifically, *to add the beneficiary to the list of people able to establish a trust on their behalf*. The Department's proceedings to amend its regulations were initiated pursuant to 29 Delaware Code Section 10114 and its authority as prescribed by 31 Delaware Code Section 512.

The Department published its notice of proposed regulation changes pursuant to 29 Delaware Code Section 10115 in the November 2017 Delaware *Register of Regulations*, requiring written materials and suggestions from the public concerning the proposed regulations to be produced by December 1, 2017 at which time the Department would receive information, factual evidence and public comment to the said proposed changes to the regulations.

SUMMARY OF PROPOSAL

The purpose of this notice is to advise the public that Delaware Health and Social Services (DHSS)/Division of Medicaid and Medical Assistance (DMMA) is proposing to amend Delaware Social Services Manual (DSSM) regarding Special Needs Trust, specifically, *to add the beneficiary to the list of people able to establish a trust on their behalf*.

Statutory Authority

- Section 5007 of the 21st Century Cures Act

Background

Section 1917(d)(3) of the Social Security Act (the Act) prescribes the rules state Medicaid agencies must apply in evaluating funds in, contributions to, and distributions from, trusts that are funded with a Medicaid applicant's or beneficiary's own assets. For a trust to meet the definition of a "special needs trust" described in section 1917(d)(4)(A) of the Act, the trust must: contain the assets of an individual under age 65 who has a disability; be established for the benefit of such individual; and direct that the state will receive all amounts remaining in the trust upon the death of such individual up to an amount equal to the total medical assistance paid by the state on the individual's behalf. Prior to the Cures Act, a special needs trust also had to be established by a parent, grandparent, legal guardian of the individual, or a court.

The requirement that a third party establish a special needs trust, which is not imposed on the other section 1917(d)(4) trusts, was identified by many stakeholders as a barrier to maximizing the independence of people with disabilities. Section 5007(a) of the Cures Act addressed this criticism for special needs trusts established on or after the date of the law's enactment, December 13, 2016.

Summary of Proposal

Purpose

The purpose of this proposed regulation is to add the individual with a disability under age 65 to the list of individuals able to establish a Special Need Trust.

Summary of Proposed Changes

Effective for services provided on and after December 13, 2016 Delaware Health and Social Services/Division of Medicaid and Medical Assistance (DHSS/DMMA) proposes to amend the Delaware Social Services Manual (DSSM) to add the beneficiary to the list of people able to establish a trust on their behalf.

Public Notice

In accordance with the *federal* public notice requirements established at Section 1902(a)(13)(A) of the Social Security Act and 42 CFR 447.205 and the *state* public notice requirements of Title 29, Chapter 101 of the Delaware Code, Delaware Health and Social Services (DHSS)/Division of Medicaid and Medical Assistance (DMMA) gives public notice and provides an open comment period for thirty (30) days to allow all stakeholders an opportunity to provide input on the proposed regulation. Comments were to have been received by 4:30 p.m. on December 1, 2017.

Provider Manuals Update

A newsletter system is utilized to distribute new or revised manual material and to provide any other pertinent information regarding manual updates. DMAP provider manuals and official notices are available on the Delaware Medical Assistance Provider Portal website: <https://medicaid.dhss.delaware.gov/provider>.

Fiscal Impact Statement

DMMA is proposing a policy change to expand the list of individuals able to establish a Special Need Trust. The Special Needs Trust is an excluded resource for Medicaid. There is no anticipated fiscal impact to the agency as a result of this proposed change in program policy.

Summary of Comments Received with Agency Response and Explanation of Changes

The State Council for Persons with Disabilities (SCPD) offered the following summarized observations:

SCPD cited Section 5007 of the federal CURES Act which amended the special needs trust standards to allow a beneficiary to establish such a trust in addition to a parent, grandparent, guardian or court. The new authorization is effective for trusts established on or after December 13, 2016. SCPD commented that DMMA's should have the same effective date.

"Subject to correcting the date and making a grammatical change, the SCPD is endorsing the proposed regulation since the initiative benefits individuals with disabilities and implements federal law."

Agency Response: DMMA agrees with the suggested grammatical and effective date changes.

DMMA is appreciative of the comments from the State Council for Persons with Disabilities. DMMA is pleased to provide the opportunity to receive public comments and greatly appreciates the thoughtful input given.

FINDINGS OF FACT:

The Department finds that the proposed changes as set forth in the November 2017 *Register of Regulations* should be adopted.

THEREFORE, IT IS ORDERED, that the proposed regulation to amend Delaware Social Services Manual (DSSM) regarding Special Needs Trust, specifically, *to add the beneficiary to the list of people able to establish a trust on their behalf*, is adopted and shall be final effective January 11, 2018.

12/20/17

Kara Odom Walker, MD, MPH, MSHS
Cabinet Secretary, DHSS

FINAL

20400.9.1 Special Needs Trusts

A special needs trust contains the assets of an individual under age 65 who is disabled. It is established for the benefit of the individual by a parent, grandparent, legal guardian of the individual or a court.

~~[For]~~ Special Needs Trusts created on or after December 13, ~~[2017]~~ 2016 by an individual with a disability under age 65 for his or her own benefit can qualify as a special needs trust, conferring the same benefits as a special needs trust set up by a parent, grandparent, legal guardian or court.

The trust may also contain the assets of other individuals.

20400.9.1.1 Treatment of Special Needs Trusts

For individuals under age 65 the exceptions to the Medicaid eligibility rules continue even after the individual becomes age 65. No additional assets may be added to the trust after the individual reaches age 65. If assets are added they will not be exempted and are subject to penalties. To qualify as a special needs trust, the following conditions must exist:

The trust must be established solely for the needs of an individual with a disability who is under age 65.

The individual is disabled as defined by the SSI program in 1614(a)(3) of the Act.

The trust must be established by the parent(s), grandparent(s), legal guardian(s) of an individual with disabilities or a court.

For trusts created on or after 12/13/2016:

The trust must be established by the disabled individual under age 65 for his or her own benefit, the disabled individual's parent, grandparent, legal guardian or court.

In addition to the above criteria, the trust **must state** that upon the individual's death all remaining assets and funds should be paid to the State agency up to the amount paid in Medicaid benefits on the individual's behalf.

10 DE Reg. 1302 (02/01/07)

15 DE Reg. 202 (08/01/11)

21 DE Reg. 566 (01/01/18) (Final)